73-5994

DEC 27 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

HERBERT M. DUNNAVILLE, JR.

Petitioner

v.

COMMONWEALTH OF VIRGINIA

Respondent

PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Herbert M. Dunnaville, Jr., petitions for a writ of certiorari to review a judgment of the Supreme Court of Virginia as follows:

I. REFERENCE TO REPORTS OF OPINIONS

A writ of error was denied by the Supreme Court of Virginia to the judgment of conviction of a trial court; and consequently no opinion was rendered or reported in an official or unofficial report.

II. STATEMENT OF GROUNDS TO INVOKE JURISDICTION

Jurisdiction is invoked on the grounds that the Petitioner was convicted by a State court of a crime for which he had already been placed in jeopardy in violation of Section 1 of Amendment XIV of the Constitution of the United States of America; and

1. The judgment sought to be reviewed was made and entered by the Supreme Court of Virginia on September 28, 1973 denying a writ of error to a judgment of conviction by the Hustings Court of the City of Roanoke on January 11, 1973 (but the name of said trial court was changed to the Circuit Court of the City of Roanoke on July 1, 1973 after the conviction); and

2. An order of the Supreme Court of Virginia was entered on October 16, 1973 staying its judgment on September 28, 1973 denying the writ of error as aforesaid in order to permit the Petitioner to have reasonable time and opportunity to apply to this Court for a writ of certiorari to review the aforesaid final judgment of that court; the stay is effective until December 27, 1973, and, if by that time the case has been docketed in this Court, thereafter until final determination by this Court; and there has been no application for a rehearing to the Supreme Court of Virginia and its judgment on September 28, 1973 is a final adjudication by the highest court of the Commonwealth of Virginia concerning the subject matter in controversy; and

3. The statutory provision believed to confer jurisdiction on this Court to review the final judgment in question by a writ of certiarari is 28 U. S. C. § 1257(3).

III. QUESTIONS PRESENTED

The sole question presented for review by this petition for a writ of certiorari is whether the incidental act of detention or transportation associated with rape is a second criminal offense of abduction for which a convicted rapist may also be charged without being placed in jeopardy twice for the same offense.

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision which this case involves is the second sentence of Amendment XIV, Section 1, of the Constitution of the United States and is as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

By judicial decision, the aforesaid due process clause of the Fourteenth Amendment makes the double jeopardy clause of Amendment V of the Constitution of the United States applicable to the State criminal proceedings, and is as follows:

> " . . . nor shall any person be subject for the same offense or to be put twice in jeopardy of life and limb . . ."

The double jeopardy hereby involved is a conviction of abduction under Va. Code § 18.1-38 which is as follows:

"Abduction with the intent to extort money, or pecuniary benefit, abduction of any person with intent to defile such person, and abduction of any female under sixteen years of age for the purpose of concubinage or prostitution shall be punished with death, or by confinement in the penitentiary for life or any term not less than three years."

V. STATEMENT OF THE CASE

The following is a concise statement of the case confined to the question presented. Page references to the record prepared by the clerk of the trial court are preceded by the letter "R" and to the transcript of the testimony and incidents of the trial by the letter "T". The Petitioner is referred to as "Dunnaville" and the Respondent as "Virginia".

Dunnaville was indicted by a grand jury of the Hustings Court of the City of Roanoke on October 2, 1972 charging him by Count 1 with attempted rape as defined by Va. Code § 18.1-16 and by Count 2 with abduction as defined by Va. Code § 18.1-38 (R-1). He was jointly tried on both counts by a petit jury of said trial court on December 14, 1972 and the jury returned a verdict of not guilty of attempted rape as charged by Count 1 of the indictment but guilty of assault as a lesser included offense with punishment by one month in jail; and guilty of abduction as charged by Count 2 of the indictment with punishment by confinement in the penitentiary for five years (R. 6-7; R. 8; R. 9; and R. 10). Throughout the trial, Dunnaville excepted to the treating of the detention or transportation of the prosecutrix essential for the alleged attempted rape as a second offense of abduction and his objections included the grant-

ing of instructions or charges to the jury which did not make such distinction under the facts (T. 149-150; T. 151; and T. 152-153). After the verdict but before sentencing, Dunnaville moved the verdict under Count 2 be set aside as contrary to the law and evidence because there was no evidence of abduction and the verdict under Count 1 precluded a second conviction under Count 2 of the indictment (T. 157); and the trial court set aside the verdict under Count 1 of the indictment (T. 157-158); but the order erroneously recites Dunnaville's motion to set aside the verdict was directed to Count 1 of the indictment which was actually set aside (R. 7). The sentence was postponed until January 11, 1973 when Dunnaville was sentenced to five years in the penitentiary in accordance with the jury verdict convicting him of abduction as charged in Count 2 of the indictment (T. 162); and a formal judgment of conviction was rendered on the same day by the trial court (R. 25-26). Dunnaville petitioned to the Supreme Court of Virginia for a writ of error to the judgment of conviction which was denied by the order of that court on September 28, 1973. (See appendix to this petition.)

While Dunnaville denies he was the assailant, he is hereinafter referred to as such because of the jury's verdict convicting him under both counts of the indictment.

Shortly after midnight or at approximately 12:30 or 1:00 A. M. on August 31, 1972 (T. 8), the prosecutrix, Linda Sue Alexander Fields, was returning to her dwelling in an apartment complex designated as 2251 Mountain View Terrace, in the City of Roanoke, Virginia (T. 14). As she approached the steps leading to the door of her apartment building, a young Negro male

(later identified as Dunnaville) walked from behind her, put his arm around her neck, placed a cold metal object to the back of her neck and stated "Let's go" (T. 9). After they went into her apartment, he closed the door and this was the first time she saw that the cold metal object was a pistol (T. 18; fifth answer and T. 9; last answer). During the entire course of events, he never threatened her with the pistol beyond having it in his hand (T. 17). They went through the apartment and then Dunnaville had the prosecutrix undress. She cooperated because she was afraid of him and he had a gun in his hand (T. 11; fifth answer and T. 19; second answer). He subsequently lowered his pants and rubbed his penis against her body (T. 12).

Then Dunnaville began to expound on the fact that he was human and not black and that she was human (T. 12) and he was not going to do anything to her but leave (T. 19-20). The only statement made by Dunnaville as to why he was there was that "he was going to ball her" (T. 20). The prosecutrix repudiated her statement that Dunnaville said "I came here to ball you but since you are having your period, I'm not going to touch you" (T. 12; T. 19).

The Dunnaville left. The entire episode lasted about twenty minutes (T. 13).

VI. ARGUMENT

A writ of certiorari should be granted because the appended judgment of the Supreme Court of Virginia decides a federal question of substance in a way inconsistent with the decisions of courts of last resort of the

several states and should be clarified by a decision from this Court.

The Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment. *Benton* v. *Maryland,* 395 U. S. 784 (1969). Consequently a conviction for destruction of city property in violation of the city's ordinances has been held to prohibit a subsequent criminal charge of grand larceny of same city property, *Waller* v. *Florida,* 397 U. S. 387 (1970); and the test is whether the accused has been "placed in jeopardy" and not whether he has been actually convicted of a criminal offense involving the same act. *Ashe* v. *Swenson,* 397 U. S. 436 (1970).

Here Dunnaville was charged with attempted rape under Count 1 of the indictment and abduction under Count 2 of the indictment. Because Dunnaville had not been previously charged, tried, convicted or acquitted of either charge prior to the indictment and because the facts of the abduction could have been something besides the acts of attempted rape, Dunnaville was not necessarily informed by the indictment that the abduction was the detention or transportation essential to the attempted rape to which he could file a plea of double jeopardy. (At all times, Dunnaville denied he was the assailant with personal knowledge of the facts.) While he could not prior to the trial have requested Virginia elect as to which count of the indictment she would seek a conviction, he immediately raised the question when the Commonwealth rested her case (T. 20(a)). At that point, he moved the trial court to strike the evidence as to Count 2 of the indictment because of double jeopardy and renewed the motion at the conclusion of all the evidence (T. 149-150). Furthermore, since he was

being simultaneously placed twice in jeopardy, he objected to Jury Instruction no. 1 because it failed to tell the jury they could not find Dunnaville guilty under both counts of the indictment (T. 151).

Assuming for the purpose of argument the evidence of abduction was beyond that incidental to the attempted rape, Dunnaville also objected to the granting of Jury Instruction no. 3 submitted on behalf of Virginia because it did not require an element of the offense of abduction beyond the assault or assault with intent to rape as charged by Count 1 of the indictment (T. 152-153). More particularly, this instruction told the jury they might convict under Count 2 of the indictment if Dunnaville "seized, took, transported, *detained, or* secreted" the prosecutrix with the intent to defile her (R. 15). Since the conjunction "or" was used, the jury could have concluded that if Dunnaville simply *detained* the prosecutrix in her apartment with the intent to rape her, he was guilty of abduction. Yet under Count 1 of the indictment, the jury concluded Dunnaville was guilty of an assault which is defined as the unconsented forcible touching of the prosecutrix, *Crosswhite* v. *Barnes,* 139 Va. 471 (1920); but the jury found he did not attempt to rape her. Since forcible touching of the prosecutrix with an *intent* to rape her would have been attempted rape, *Ingram* v. *Commonwealth,* 192 Va. 794 (1951), the jury acquitted Dunnaville of acting with an intent to rape or defile the prosecutrix when he was touching and detaining her.

Consequently the finding by the jury of Dunnaville as guilty of assault as a lesser included offense of attempted rape under Count 1 of the indictment necessarily precluded a finding of Dunnaville as guilty of

detaining the prosecutrix with the intent to defile her; but under Jury Instruction no. 3, he could have been convicted of doing no more than assaulting her with an intent to defile her.

Even though the error of the trial court might have been one of faulty charge to the jury as opposed to double jeopardy, the point is that under the facts and instructions as charged to the jury, Count 1 and Count 2 of the indictment were simultaneous criminal charges for the same offense. Furthermore the trial court did not eliminate this error by setting aside the jury verdict of guilty of assault as a lesser included offense under Count 1 of the indictment because at that time, Dunnaville had already been "placed in jeopardy". Thus for the purpose of this review by writ of certiorari, the issue is whether the necessary detention incidental to an assault or an assault with an intent to rape (or for the purpose of argument, rape itself) can constitute a separate offense of abduction without violating the double jeopardy clause.

While there is no Virginia decision on the precise question of whether the retraint or asportation essential to rape constitutes the separate crime of abduction, the courts of last resort in other jurisdictions have considered this point. In *People* v. *Lombardi,* 20 N. Y. 2d 666, 229 N. E. 2d 206 (1967), the defendant was convicted of kidnapping, attempted rape and lesser assaults. He was a pharmacist and on three separate occasions he hired a young girl to accompany him on a business trip. Before each trip, he gave the particular woman pills misrepresenting their purpose. Actually the pills made the victims unable to coordinate muscular movement. He then made sexual advances toward each woman. These advances were the basis of the charges of attempted rape.

In each case, the woman was returned to her house by the defendant. The asportation of the three women from Manhatten to Queens (sections of the City of New York) aided in part by the drugs, and the physical domination of them in a hotel room made possible by the drugs, made the defendant's acts within the literal terms of the kidnapping statute. The Court of Appeals of New York noted that this crime was no different from drugging the women in the pharmacy and taking them into the back room and making sexual advances which also would be within the definition of the kidnapping statute. The court held the kidnapping statute does not apply to acts which are essentially the crimes of robbery, rape or assault and which some confinement or asportation occurs as a subsidiary incident.

People v. *Lombardi, supra,* followed the rule established in *People* v. *Levy,* 15 N. Y. 2d 159, 204 N. E. 2d 842 (1965). In that latter case, the defendants accosted a husband and wife who were stopping their automobile, entered and took possession of the car with guns, and robbed the husband and wife during a drive taking approximately twenty minutes going a distance of twenty seven blocks. The Court of Appeals of New York held that the incidental restraint caused by the robbery could not be kidnapping. The automobile was a situs of the robbery and the restrain of the husband and wife while the car was moving was no different in relation to the robbery than would be the tying of a victim in a bank and moving him into another room. In essence the crime remained robbery although some of the statutory language of the kidnapping statute might literally apply. Of course, robbery and kidnapping could simultaneously occur such as where the victim of a robbery was taken

as a hostage and held for a considerable time after the robbery had been completed.

People v. *Levy, supra,* represents the modern trend and expressly overruled *People* v. *Florio,* 301 N. Y. 46, 92 N. E. 2d 881 (1950). In that latter case, the defenddants were prosecuted under an indictment charging, in separate counts, kidnapping, rape and assault. They enticed the prosecutrix into an automobile and, against her will, detained and confined her therein while transporting her through various counties to a secluded place where each defendant raped her. On appeal, the defendants asserted they could not be guilty of kidnapping since it was merely incidental to the rape and assault even though the statute provided "A person who . . . takes or detains a female unlawfully against her will, with intent to compel her by force, menace or duress, . . . to be defiled; . . . is guilty of abduction." The Court of Appeals held that the detaining and transporting the prosecutrix was separate from the assault and rape. However, the court did concede:

> "It is true that the detention inevitably occurring during the immediate act of commission of such a crime as rape or robbery would not form a basis for a separate crime of kidnapping. That, however, is not the case. Defendant's inveiglement, detention and confinement of a woman unknown to them against her will and without authority of law, constituted a separate and distinct crime of kidnapping." 92 N. E. 2d at page 882.

Thus under present New York law, the transportation of a woman incidental to the rape of her is not a separate crime of kidnapping; but even under the previous law, if the detention was no more than what was necessary

to commit the rape, there could not be a conviction of both.

The same modern trend of the law exists in California. A recent case holds that the defendant's act in the course of robbery and rape in causing the victim to move across the living room and into the bedroom of her home was merely incidental to the robbery and rape and did not substantially increase the risk of harm beyond that inherent in the act of robbery and rape, and did not constitute a separate offense of kidnapping, *People* v. *Norman,* 93 Ca. Rptr 749, 482 V. 2d 661 (1971); *accord*: *People* v. *Mutch,* 4 Cal. 3d 389, 482 P. 2d 633 (1971).

The landmark case in California analyzing the authorities throughout the country in somewhat detail is *People* v. *Daniels,* 71 Cal. 2d 1119, 459 P. 2d 225 (1969). There the Supreme Court of California dealt with the precise issue here involved. There the defendants were charged with kidnapping victims for the purpose of robbery. Four different women had been robbed on four different occasions. In each case, the women were not only robbed but raped. Under count 3, a gun was placed to the neck of the victim and she was made to move around in her dwelling. Clearly the defendants were guilty of seizing and detaining their victims for defiling them and the victims suffered bodily harm. Nevertheless, the Supreme Court of California held that the movements which the defendants compelled their victims to perform inside the premises in which the defendants found them in furtherance of the robberies and rapes were merely incidental to the crimes of robbery and rape particularly when they did not substantially increase the risk of harm to the victims otherwise present, and these acts did not constitute the separate crime of kidnapping.

People v. *Daniels, supra,* specifically reversed *People.v. Chessman,* 38 Cal. 2d 166, 238 P. 2d 1001 (1951). In that case, the famous Caryl Chessman (noted for his various novels written while on death row at a California penitentiary) was convicted of seventeen felonies including counts of robbery, rape and kidnapping. In regard to the definition of kidnapping, the Supreme Court of California held "It is the fact, not to distance, or forcible removal which constitutes kidnapping in this state." Even under this prior interpretation now disregarded, the court held that where an act involving all that is required for the crime of robbery is also the crime of kidnapping, then to convict the defendant of both kidnapping and robbery is double punishment.

This decision on double punishment followed the decision earlier announced in *People* v. *Knowles,* 35 Cal. 2d 175, 217 P. 2d 1 (1950). There David Knowles was convicted of armed robbery and kidnapping for the purpose of robbery. The Supreme Court of California held that whether he was sufficiently indentified as the guilty person was for the trier facts under the evidence, but he could not be convicted of both armed robbery and kidnapping because it was double punishment. The court held that to guard for fifteen or twenty minutes the victim who had been forced in a room twenty-five feet away by gun point was a violation of the statute penalizing one who seized, holds or detains another to commit extortion or robbery; but nevertheless reversed the kidnapping conviction because it would be double punishment.

Thus under present California law as announced in *People* v. *Daniels, supra,* the incidental act of detention or transportation associated with rape is not the crime of kidnapping or abduction even though it literally

comes within the terms of the statute. Even under previous decisions holding that such detention and transportation was a separate crime of kidnapping, a defendant coul not be convicted for both the rape and kidnapping.

The modern trend of present New York and California law is apparently to interpret abduction statutes as not being intended by the legislature to include the seizure or detention essential for the purpose of committing robbery, rape or similar offenses; and the courts of last resort in some states continue to hold to the contrary. *Eg.*: *State* v. *Jacobs* 93 *Ariz.* 336, 380 P. 2d 998 (1963); cert den 375 U. S. 46 (1963). Even so, such decisions would not be in conflict with the previous New York and California decisions holding that the detention inevitably occurring during the immediate act of commission of a rape or robbery, even though constituting the offense of abduction, can not form the basis of a separate criminal charge without being double jeopardy.

First Dunnaville asserts that this Court in order to establish a uniform application of the federal double jeopardy rule, should follow the decisions of New York and California and hold that seizure and detention for the purpose of committing a rape can not form the basis of a criminal offense of abduction. Second, if the Court rejects such argument, the Court should hold the detention necessarily accompanying the immediate act of a rape or attempted rape, even if abduction, can not form the basis of a second charge when the accused is charged with rape or attempted rape. Under the charge to the jury by the trial court, the act of holding a woman while raping her would constitute separate crimes of rape and abduction. Under the charge to the jury, Count 1 and Count 2 of the indictment charged the same offense and it was double jeopardy to submit both criminal

charges to the jury under the particular instructions of the trial court based on the particular facts of the case. The jury verdict finding Dunnaville guilty of assault under Count 1 of the indictment necessarily precluded the jury verdict of finding Dunnaville guilty under Count 2 of the indictment; and the trial court could not avoid the "double conviction" by setting aside the verdict as to Count 1 after Dunnaville had already been placed in jeopardy. This is particularly true when Dunnaville made the appropriate exceptions to the rulings of the trial court throughout the trial contending the trial court was misinterpreting the rule of law as to double jeopardy as argued here.

VIII. CONCLUSION

The Supreme Court of Virginia erroneously decided the federal question of double jeopardy and its judgment is clearly in conflict with decisions of courts of last resort of other States and numerous lower federal courts requiring this Court to clarify this rule of law. Because Dunnaville has received a sentence to the penitentiary for a long term based on this doubtful decision about a principle of law which this Court must review soon, justice demands a writ of certiorari be awarded to review the judgment rather than a later review of the principles involved in another case after Dunnaville has served all or part of his sentence.

Respectfully submitted,
HERBERT M. DUNNAVILLE
By: John H. Kennett, Jr., his counsel

John H. Kennett, Jr.,
133 Kirk Avenue, Southwest
Roanoke, Virginia
Counsel for Petitioner

VIII. PROOF OF SERVICE

I, John H. Kennett, Jr., counsel for the Petitioner and a member of the bar of the Supreme Court of the United States, do hereby certify that on the 27th day of December, 1973, I served a true copy of the foregoing petition for writ of certiorari on the Respondent, Commonwealth of Virginia, by mailing three copies of same in a duly addressed envelope by first-class with postage thereon prepaid addressed to Andrew P. Miller, Attorney General of Virginia, Supreme Court Building, Richmond, Virginia.

JOHN H. KENNETT, JR.
Counsel for Petitioner

IX. APPENDIX

This appendix consists of the judgment of the Supreme Court of Virginia sought to be reviewed.

IN THE SUPREME COURT OF VIRGINIA ON THE 28th DAY OF SEPTEMBER, 1973

HERBERT M. DUNNAVILLE, JR.

Plaintiff in error

against

COMMONWEALTH OF VIRGINIA

Defendant in error

The petition of Herbert M. Dunnaville, Jr., for a writ of error and supersedeas to a judgment rendered by the Circuit Court of the City of Roanoke, formerly the Hustings Court of the City of Roanoke, on the 11th day of January, 1973, in a prosecution by the Commonwealth against the said petitioner for a felony, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said court, which court shall allow court-appointed counsel the sum of $150 as compensation for services rendered on this appeal, and also his necessary direct out-of-pocket expenses.

And it is ordered that the Commonwealth recover of the plaintiff in error the said amount paid counsel appointed to represent him on this appeal, his necessary direct out-of-pocket expenses and the costs to be assessed in this case by the clerk of the court below.

A Copy,
Teste:

Howard G. Turner, Clerk
By: *Allen L. Lucy,*
Deputy Clerk